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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1072

BILLIE JEAN FLORES,

Petitioner,

versus

CABOT CORPORATION and
TRAVELERS INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

BLLIE JEAN FLORES,
Petitioner,

versus

CABOT CORPORATION and
TRAVELERS INSURANCE COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on October 12, 1979.

OPINION BELOW

The opinion of the Court of Appeals (Appendix "A") is officially reported at 604 F.2d 385 (5 Cir. 1979). There is no written opinion on the merits by the District Court.

JURISDICTION

The judgment of the Court below (Appendix "A") was entered on October 12, 1979. No petition for rehearing was filed in the Court of Appeals for the Fifth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the substantial rights of a claimant are adversely affected when a trial judge tells the jury of claimant's other lawsuit arising out of the same event resulting in the present suit and claimant's compromise of that suit when the parties released through compromise are not defendants in the present suit, have no stake in its outcome, or concern for who any witness is or how any witness testifies, and where the court can prevent double recovery by itself deducting from any award funds received in settlement.

STATUTES AND RULES INVOLVED

Rule 401 of the Federal Rules of Evidence provides:

> 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402 of the Federal Rules of Evidence provides:

> Evidence which is not relevant is not admissible.

Rule 403 of the Federal Rules of Evidence provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury. . . .

Rule 408 of the Federal Rules of Evidence provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or in validity of the claim or its amount. The evidence of conduct of compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 61 of the Federal Rules of Civil Procedure provides:

No error in either the admission or the exclusion of evidence and no error or defect of any ruling or order or in anything done or omitted by the court or by any of the parties is grounds for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial right of the parties.

STATEMENT OF THE CASE

Petitioner filed this diversity products liability action against Cabot Corporation and its insurer, Travelers Insurance Company, for the wrongful death of her husband. 28 U.S.C. §1332. Petitioner contends that her husband's death was a result of the defendant's defective product and/or its design.

On February 26, 1974, decedent fell to his death from a telescoping rig located in Cameron Parish, Louisiana. He was an employee of Ward Drilling Company, which had leased the rig from Condor Pipe Company, Inc. The derrick was being rigged up in preparation for drilling.

The rig was a 96' tall telescoping derrick, consisting of two sections. The bottom section was attached to the

flatbed of a truck and had been raised into position. The upper section had been scoped up. A ladder was attached to each section of the derrick. The bottom ladder was welded into place, and the upper ladder was hinged. This hinged ladder was designed to free fall into a fixed position when the upper section of the derrick was raised up, and to retract up against the derrick when the upper section was lowered. A steel beam encircling the derrick separated these two sections.

Shortly before his fall, decedent was climbing the welded ladder pursuant to instructions to unlatch a chain attached in the upper section of the derrick. After the decedent had climbed the derrick to the point where the two sections were joined, he reached up and grabbed the bottom of the hinged ladder. That ladder thereupon fell down upon his arm and/or hand. A coemployee heard a loud crashing noise immediately followed by decedent's scream. Decedent was then seen hanging from the derrick with one arm and both legs swinging free of the derrick and ladder. He hung in this position for a few seconds and then fell an estimated 60' to his death.

The derrick was built originally by Frank's Manufacturing Corporation, the corporate ancestor of Cabot, sometime between 1945 and 1950. While Cabot denies that it or Frank's built the hinged ladder assembly, it admittedly was the manufacturer of the derrick and most of its components. Cabot even serviced this derrick as late as 1975 at its Houston facilities. Cabot admits hav-

ing a service file for this equipment, but did not produce it at the trial. Cabot said that it does not service the products of its competitors.

Plaintiff earlier filed two suits in Louisiana state courts. An executive officer suit was filed in Cameron Parish against Ward's president and rig manager, and a separate suit was filed in Lafayette Parish against Condor Pipe Company as owner of the rig. Prior to this trial, plaintiff compromised both state court claims. Both the lower court and defense counsel were informed well in advance of the trial of these settlements, and both were furnished with copies of all settlement documents.

Prior to taking any testimony, and again in its closing instructions to the jury, the trial court informed the jury that plaintiff had filed suits in state courts against certain other persons for her husband's death and that she had compromised those claims.

The case was submitted to the jury on special interrogatories, in answer to which the jury found that the ladder hinge assembly had not been manufactured by Cabot or its corporate ancestor, Frank's.

The Court of Appeals affirmed *per curiam* upon concluding that since the record on appeal did not include a transcript of the entire trial proceeding, it could not determine whether petitioner's case was materially prejudiced by the trial court's comments to the jury.

The Court of Appeals did not even reach the question of whether or not the trial court erred when it informed the jury of petitioner's prior state court suits and their settlement. No oral argument was presented in the Court of Appeals.* On October 12, 1979, the Court of Appeals affirmed the judgment in favor of respondents.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed by the Supreme Court because it is contrary to a decision of this Court, contravenes the Federal Rules of Civil Procedure and the Federal Rules of Evidence, and erroneously treats the issue presented as one of fact rather than law.

The single issue here is whether the substantial rights of a claimant are adversely affected when a trial judge tells the jury of claimant's other lawsuit arising out of the same event resulting in the present suit and claimant's compromise of that suit when the parties released through compromise are not defendants in the present suit, have no stake in its outcome, or concern for who any witness is or how any witness testified, and where the court can prevent double recovery by itself deducting from any award funds received in settlement.

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* The case was placed on the summary calendar by the Court of Appeals under its Rule 18 after refusing to allow respondents to file a brief which was more than 4 months past the deadline for filing such brief.

Rule 402 of the Federal Rules of Evidence provides that, "evidence which is not relevant is not admissible." The factual issues presented in this action were: (1) whether Cabot, or its corporate ancestor was the manufacturer of the ladder hinge assembly; (2) if so, was Cabot liable in strict liability on the grounds that the product was unreasonably dangerous in normal use, defective, and the cause of decedent's death; (3) had the decedent voluntarily and unreasonably assumed the risk; and (4) what damages, if any, was petitioner entitled to recover. In contrast with the state court suits in which contributory negligence is an absolute bar to recovery, sucn contributory negligence is no defense in an action founded upon strict liability. *Weber v. Fidelity Cas. & Ins. Co. of N.Y.*, 250 So.2d 754 (La. 1971); *Jones v. Menard*, 559 F.2d 1282 (5 Cir. 1977); *Hastings v. Dis Tran Products, Inc.*, 389 F.Supp. 1352 (W.D. La. 1975); *Chappuis v. Sears Roebuck & Co.*, 358 So.2d 926 (La. 1978).

Rule 401 of the Federal Rules of Evidence supplies the test as to whether or not the evidence presented by the trial court was relevant or not. Rule 401 states:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Clearly, the fact that petitioner had filed negligent actions against other defendants in other proceedings and her settlement of both claims is irrelevant by definition. *Cf., Vockie v. General Motors Corporation, Chevrolet Div.*, 66 F.R.D. 57 (E.D. Penn. 1975), aff'd mem., 523 F.2d 1052 (3 Cir. 1975); *Landry v. Adam*, 282 So.2d 590 (4 Cir. 1973), where the court held that recall notices issued by an automobile manufacturer to prove that a particular automobile contained the defect toward which the recall was directed were irrelevant.

The trial court's presentation of this information cannot be considered as harmless error. Rule 61 of the Federal Rules of Civil Procedure defines harmless error as one which does not affect the substantial rights of a party. One cannot argue that this error was harmless on the basis that the jury found that that hinge assembly had not been manufactured by defendant or its corporate ancestor. *Cf., Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 37 (1963), reh. den'd, 375 U.S. 936 (1963).

Assuming the relevancy of this evidence, Rule 403 of the Federal Rules of Evidence provides that even relevant evidence "may be excluded it its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, . . ." See, *e.g. Seven Provinces Ins. Co., Ltd. v. Commerce & Industry Ins. Co.*, 65 F.R.D. 674 (W.D. Mo. 1975); *Vockie v. General Motors Corp., Chevrolet Div., supra*, where the court held that evidence of the failure of engine mounts on some cars of the manufacturer, rather than the specific model at issue, was inadmissible as confusing and prejudicial.

Courts unquestionably have the duty of weighing the admissibility of relevant evidence and its potential for creating undue prejudice before permitting or excluding otherwise relevant evidence. An enlightening discussion of this task is found in *International Shoe Machine Corp. v. United Shoe Machinery Corp.*, 315 F.2d 449, 459 (1 Cir. 1963), writ den'd, 375 U.S. 820 (1963), where the court said that:

> . . .[r]elevancy is not the only factor to be considered by a court in determining the admissibility of evidence of this character. The courts traditionally must weigh the probative value of the evidence sought to be admitted against the capacity for prejudice which the evidence might engender. Where the prejudice quotient is high, this fact will frequently render inadmissible evidence which — from a purely logical standpoint — may have a significant probative thrust. . . . '[I]f certain evidential material, having a legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent, * * * there is good ground for excluding such evidence, unless it is indispensable for its legitimate purpose.'

There has been no attempt to establish that evidence of petitioner's other claims and her compromises thereof were offered for any legitimate purpose. The jury was never told of the nature of those suits, the theory of

recovery, the amount of money received in settlement, or the issues involved. Indeed, the trial court specifically instructed counsel not to mention these lawsuits or any matters pertaining to them at any time during the trial. Since this evidence bore no relation to the issues and credibility of any witness, one is compelled to conclude that the jury regarded petitioner's case with suspicion and doubt, because it understood and knew nothing of these other lawsuits except for their existence and the fact that petitioner had already been compensated through their settlement.

The action of the trial court is in direct conflict with this Court's decision in *Tipton v. Socony Mobil Oil Co., supra,* holding that it was reversible error to admit evidence of receipt of compensation benefits paid under the Longshoremen's Act. The principal issue was whether the petitioner was a seaman within the coverage of the Jones Act. Over objection by plaintiff's counsel, the district court allowed evidence showing that petitioner had accepted compensation benefits under the Longshoremen's Act. In response to a special interrogatory, the jury found that petitioner was not a seaman or member of a crew of a vessel within the meaning of the Jones Act. The Court of Appeals held it error to have admitted evidence of other compensation benefits but found the error harmless. The judge, in his instructions, told the jury that such evidence was not dispositive of the ultimate fact of whether petitioner was a seaman. In reversing, this Court said:

> We disagree with the suggestion of the Court of Appeals that the prejudicial effect of

> the evidence of other compensation would be restricted to the issue of damages and would not affect the determination of liability.*

The same prejudicial effect of evidence of receipt of compensation through settlement with other parties is present here, notwithstanding the jury's finding in response to a special interrogatory that the hinge assembly was not manufactured by respondent. Such evidence presented by the district court itself was offered for no legitimate purpose and constitutes a clear violation of Rule 408 of the Federal Rules of Evidence. The district court was incorrect, in responding to counsel's objection to such evidence, in stating that, "[i]f I'm going to err, its going to be on the side of giving the jury all of the facts surrounding this law suit." (Appendix "B", page 10a). While the district court claims to have given the jury all of the facts, it is surprising to note that it failed to tell the jury the basis for the state court's suit, the theory of liability, and the terms of the compromises. The court went further by prohibiting counsel for making any mention to the jury of these suits and compromises. The trial judge substantially prejudiced petitioner's case from the very outset by planting in the juror's mind a seed of doubt, and perhaps even distrust for petitioner's claim.

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* This Court noted in note 2 that the majority of the Court of Appeals explained in its conclusion that, "[I]n view of the fact that the jury, having decided the question of status adversely to appellant, never reached the issue of damages, we believe that the error did not preuudice appellant and was harmless." 315 F.2d 660, at 662.

Petitioner's receipt of funds through settlement of other claims with persons not defendants in this lawsuit is at a minimum analogous to the compensation funds in *Tipton*. There this Court noted that the prejudicial effect of evidence of other compensation is not restricted to the issue of damages but overlaps into the pristine issue of liability itself.

Courts recognize the undeniable effect of the human factor on the outcome of a jury trial. In *Theriot v. Mercer*, 262 F.2d 754, 756 (5 Cir. 1959), writ den'd *sub. nom., Mercer v. Theriot*, 359 U.S. 983 (1959), reh. den'd, 360 U.S. 914 (1959), the Court of Appeals, in referring to one of its earlier decisions, wrote:

> . . . This court, as preliminary to disposing of the question for decision there, whether the trial had been attended with reversible error, carefully examined and as carefully showed forth the intensely dramatic nature and atmosphere of a jury trial and how it affects the actors in it, the witnesses, the lawyers, the litigants, the tryers themselves — judge and jury. Pointing out that many verdicts in closely contested civil and criminal cases find their real spring in the atmosphere generated in and by the trial, whether things felt but unseen, sometimes real, sometimes illusory, arising out of but more than the relevant and admissible evidence, in the end more influenced the verdict than the relevant testimony itself does. . . .

If *Tipton* is not directly dispositive of this issue, nevertheless its spirit, logic and wisdom compel its extension here. Mr. Justice Frankfurter once wrote that "wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters National Bank*, 335 U.S. 595, 600 (1949). Experience has taught us that evidence of compromises is inadmissible, except in limited situations where offered for a specific purpose other than to establish or deny liability. Mr. Justice Cardozo has written: "Holmes taught us in a sentence which is now classic that 'the life of the law has not been logic; it has been experience.' But Holmes did not tell us logic is to be ignored when experience is silent." Cardozo, *The Nature of the Judicial Process*, p. 32-33 (17th ed.).

Rule 408 of the Federal Rules of Evidence embodies a well-settled principal of law that "[s]ettlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits." *D. H. Overmyer & Co. v. Loflin*, 440 F.2d 1213, 1215 (5 Cir. 1971), cert. den'd, 404 U.S. 851 (1971), militates against the admission of such compromises; *Tipton v. Socony Mobil Oil Co., supra; Mangan v. Broderick & Bascom Rope Co.*, 351 F.2d 24, 29 (7 Cir. 1965), holding that it was reversible error to let the jury know that plaintiff had received insufficient benefits since such evidence was highly prejudicial, stating:

> Unless such evidence has some legitimate purpose other than to advise the jury that a plaintiff has been partially paid for his injury, a strict exclusionary rule should be applied.

The dictates of *Tipton* mandate a finding of reversible error by the district court.

Petitioner acknowledges that evidence of compromise is admissible where, for example, a claimant settles with one or more co-defendants in a lawsuit. In *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5 Cir. 1979), the trial court properly informed the jury of claimant's settlement with certain co-defendants. There the court informed the jury of the identity of the original co-defendants, the fact that claimant had settled his claims against these co-defendants, and the terms by which these co-defendants might recover back certain monies depending upon the jury's verdict. Because of the *continuing interest* in the same lawsuit of the various witnesses for the settling co-defendants, the trial court considered such information necessary for the jury. It is clear, however, from *Leger* that the proper way for the trial court to handle settlements in a jury trial where the settling defendants have no continuing interest in the outcome of the lawsuit is as stated in *Billiot v. Stewart Seacraft, Inc.*, 382 F.2d 662, 665-666 (5 Cir. 1967), where the court there said:

> If the trial is to a jury, we think that the better procedure is to withhold evidence of settlement from the jury which will determine the total damages, if any, caused by Seacraft. The

> trial judge will deduct from the verdict the settlement payment to arrive at the amount which will adequately compensate the appellant.

Since the state court defendants had no interest or stake in the outcome of this lawsuit, the court, in order to prevent double recovery, should not have informed the jury as it did since it has the authority to prevent double recovery by deducting from the jury's verdict the amounts obtained through settlement.

The soundness of Flores' position is demonstrated by assuming, for example, that on the date of her husband's death other employees had been killed or injured and that Cabot had settled all claims with the exception of Flores. The courts unanimously hold that petitioner would not be entitled to offer to the jury evidence of those claims and their subsequent compromise by Cabot. *Sun Oil v. Govostes*, 474 F.2d 1048 (2 Cir. 1973); *Jackson v. Shell Oil Co.*, 401 F.2d 639 (6 Cir. 1968); *Paster v. Pennsylvania R.R.*, 43 F.2d 908 (2 Cir. 1930); *Hawthorne v. Eckerson Co.*, 77 F.2d 844, 847 (2 Cir. 1939); *Winkler-Koch Engineering Co. v. Universal Oil Products Co.*, 79 F.2d 1013, 1019 (SDNY 1947); *Grady v. de Ville Motor Hotel, Inc.*, 415 F.2d 449, 451 (10 Cir. 1969), where the court stated:

> It is well settled as a matter of sound policy that the law should favor the settlement of controversies, and should not discourage settlement by subjecting a person who has

> compromised a claim to the hazard of having the settlement proved in a subsequent trial of another lawsuit by another person asserting a claim related to the controversy settled.

See, *e.g.*, *Seven Provinces Ins. Co. Ltd. v. Commerce & Industry Ins. Co.*, 65 F.R.D. 674 (W.D.Mo. 1975), involving a contract of re-insurance of a ship, where a showing that other insurers had paid on the same catastrophe to the same ship, as evidence of custom and practice, was held properly excluded as confusing and prejudicial because such evidence, although relevant, would lead to litigation of collateral issues concerning the different circumstances and motives for making the payments.

The decisions and actions of the lower court ignore petitioner's rights as provided for in the Federal Rules of Evidence and the Federal Rules of Civil Procedure, and is contrary to this Court's decision in *Tipton v. Socony Mobil Oil Co., supra*. Such action ignores the clear mandate of these rules and the decision of this Court. Indeed, the decision of the lower court permits evidence of settlement and compromise to go to the jury under all circumstances. Such action, if allowed, means a judicial abolition of these rules founded on prior jurisprudence, historical fact, experience and logic. Such a decision truly means that a claimant will have to avoid ever engaging in settlement with any person who has no continuing interest in the lawsuit or its verdict.

Finally, the Court of Appeals incorrectly dealt with the issue presented as one of fact rather than as one of

law. It did not even reach the question presented, and expressed no opinion on whether there was error committed by the district court, upon concluding that it could not determine if prejudice resulted from such action since the court had not been provided with a complete transcript of the proceedings at trial.

CONCLUSION

Evidence of petitioner's settlement of suits involving other persons was immaterial, irrelevant and highly prejudicial to her substantial rights. The trial court did not offer that evidence for any legitimate purpose, such as to show bias or prejudice. The person with whom petitioner settled her state court lawsuit had absolutely no interest in the outcome of this trial nor in the testimony of any witness. Obviously the trial court itself recognized the prejudicial nature of such evidence when it instructed counsel not to mention those matters at any time during the trial.

The error committed by the district court was not rendered moot upon the jury's finding that respondents were not the manufacturer of the hinge assembly. Since the exclusionary rule applies to collateral payments, *Tipton, supra,* such rule by logic and experience applies with equal force, logic and validity in this case.

For the foregoing reasons, the petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this ____ day of January, 1980.

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318/232-1934
ATTORNEY FOR PETITIONER

CERTIFICATE

I HEREBY CERTIFY that I have caused three true and correct copies of the above and foregoing to be served upon Mr. Nicholls Pugh, Jr., P. O. Box 3118, Lafayette, Louisiana 70502, by depositing same in the United States mail, postage prepaid, and addressed to said counsel at the above shown address.

Lafayette, Louisiana, this ____ day of January, 1980.

RICHARD R. KENNEDY

APPENDIX "A"

Billie Jean FLORES,
Plaintiff-Appellant,

versus

CABOT CORPORATION et al.,
Defendants-Appellees.

No. 78-2565

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Oct. 12, 1979.

Appeal from the United States District Court for the Western District of Louisiana.

Before GOLDBERG, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM:

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* Rule 18, 5 Cir., see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

Billie Jean Flores, widow of James Allen Flores, brought this diversity products liability action against Cabot Corporation (Cabot), the alleged manufacturer of a ladder hinge assembly which caused Mr. Flores's death. Mrs. Flores argues on appeal that the district court committed reversible error when it informed the jury of prior litigation brought by her against other defendants allegedly liable for her husband's death. We reject her contention and affirm the district court's judgment for Cabot.

On February 26, 1974, James Flores was working on an oil rig in Cameron Parish, Louisiana. A ladder hinge assembly malfunctioned and fell on Flores's arm, causing him to lose his grip and fall some sixty feet to his death. The oil derrick on which he was working was manufactured by a corporate ancestor of Cabot, but Cabot denied that either it or its ancestor built the defective ladder hinge assembly. Prior to bringing her action against Cabot, Mrs. Flores sued both Flores's employer and the owner of the oil derrick in Louisiana state court for negligently causing Flores's death. These actions were settled prior to the trial in the case now before us.

At trial, the district court, over the objection of Mrs. Flores, informed the jury that she had previously brought negligence actions for the death of her husband against other defendants in state court and that these suits had been compromised. The court instructed the jury that it could consider the fact that in these

suits Mrs. Flores had claimed that defendants other than Cabot were responsible for the accident, but also pointed out that due to the press of the statute of limitations or for other reasons such suits may have been filed before all the facts underlying the accident were developed. The case was submitted to the jury for a special verdict, *see* Fed.R.Civ.P. 49(a); the jury found on a preponderance of the evidence that the ladder assembly was manufactured by neither Cabot nor its predecessor.

Mrs. Flores argues that the district court erred when it informed the jury of her prior state court actions and their settlement. We need not, and do not, reach this question, however, as even if the district court did err (and we express no opinion on this point), Mrs. Flores has failed to demonstrate any resulting prejudice. The record on appeal does not include a transcript of the proceedings at trial; it merely features brief excerpts which contain the statements of the district court regarding the prior suits and the objections thereto. We cannot determine on the record before us whether the plaintiff's case was materially prejudiced by these comments; Cabot may have clearly demonstrated its nonmanufacture of the ladder hinge assembly completely independently of the court's purportedly erroneous instructions. Mrs. Flores bears the burden of persuasion on this appeal, and absent a showing of prejudice we shall not reverse the judgment of the district court. *See Palmer v. Hoffman*, 318 U.S. 109, 116, 63 S.Ct. 477, 481-82, 87 L.Ed. 645 (1943). Accordingly, the decision on behalf of Cabot is affirmed.

AFFIRMED.

APPENDIX "B"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

BILLIE JEAN FLORES

versus C,A. No. 75-0039

CABOT CORPORATION, et al

Before the
Honorable W. Eugene Davis

REPORTER'S OFFICIAL TRANSCRIPT
OF REQUESTED PORTIONS
OF PROCEEDINGS AT TRIAL

United States Courthouse
Lafayette, Louisiana

June 26, 1978

June 30, 1978

[2] APPEARANCES:

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BE IT REMEMBERED that in the United States District Court, Western District of Louisiana, Lafayette Division, in the United States District Courthouse in the city of Lafayette, Louisiana, on the 26th and the 30th day of June, 1978, the above entitled cause came on for trial before the Honorable W. Eugene Davis, Judge of said court, and the requested portions of the proceedings on the trial are in the words and figures following, to wit:

[3] INDEX OF DESIGNATED PORTIONS OF TRANSCRIPT:

Designated portion No. 1 ..... P. 4
Designated portion No. 2 ..... P. 5
Designated portion No. 3 ..... P. 10

[4] (Reporter's note: The following is the requested portion of the proceedings had at trial on June 26, 1978, prior to the jury selection, as requested on behalf of the plaintiff by Mr. Richard R. Kennedy.)

THE COURT:

Now, gentlemen, I told you in chambers what I propose to do with respect to the issue of the state court suits and with respect to the settlement. I'm going to give the jury an objective statement about the state court suits and about the settlement. I'm going to give that statement before the trial begins and I'm going to give essentially the same statement as part of my charge. I'm going to direct all counsel to refrain from making any reference to either the state court suits, any allegations in those suits and also refrain from making any reference to the compromise to the settlement, to the terms of the settlement or the facts of the settlement.

Now, gentlemen, I'll give you an opportunity at the next break after the jury comes in to preserve your objections. I understand there are objections and I'll give you full opportunity to make them for the record.

(Reporter's note: The following is the [5] requested portion of the proceedings had in the presence of the jury on April 7, 1978, as requested on behalf of the plaintiff by Mr. Richard Kennedy.)

THE COURT:

Now, in addition to this suit that was filed by the plaintiff against Cabot, the plaintiff filed a suit in the state court system against Condor Pipe Company and an individual named Daniel Faherty. Mr. Faherty was an employee of Ward Drilling Company which was the drilling contractor for whom Mr. Flores worked.

Now, Ms. Flores alleged in that suit filed in state court, that her husband was killed — the accident in which her husband was killed occurred through the fault of Condor Pipe Company and Faherty. Now, that suit has been compromised. Now, you may consider the fact that this petition that I just referred to was filed in state court claiming that Condor Pipe Company and Faherty was at fault. However, the fact that a petition is filed does not constitute the proof of the fact set out in the petition. Petitions are filed by attorneys who represent clients for many reasons. For example, they may be filed early before the facts develop, and under Louisiana law, a petition in a case such as this must [6] be filed within one (1) year or the claim is deemed to have become time barred or prescribed. So, while you may consider the fact that this petition was filed, the fact that it was filed is not proof of what's contained in that petition.

The issue of whether Condor Pipe Company or Daniel Faherty was at fault has never been litigated. That

has never been determined by a jury or a Court. In this case there will be an issue and this will be an issue for you to determine as to whether Condor Pipe Company and Mr. Faherty were at fault and whether their fault contributed to Mr. Flores' accident.

I just told you what the plaintiff's burden of proof was to establish his claim. The burden of proof with respect to the negligence or fault of Condor Pipe Company and Mr. Faherty will be on Cabot. The defendant will have the burden of establishing that the accident was caused either wholly or in part through the fault of Condor Pipe Company or Faherty. That will be one of the factual issues that will be submitted to you.

Now, let me tell you what the significance of the fault of Condor and Faherty is. They are not parties to this suit, but under Louisiana law if Cabot is held responsible to the plaintiff, if you find that [7] the product was defective, and therefore Cabot is held responsible to Ms. Flores for damages, then if Cabot can establish that there were other parties at fault, whose fault jointly caused the accident, then the damages that Cabot will be required to pay will be reduced. In other words, Cabot will not have to bear the entire burden of Ms. Flores' damages if other parties, that is, if Condor and Faherty are found to be at fault. Now, I'll explain that in more detail when I give you the law to apply to the case, but one of the interrogatories you will have will be what are the damages sustained by Ms. Flores, and you will determine the entire damages that she has suffered, her entire loss, and then if Condor or Faherty is found at fault, then the Court will reduce the damages that Cabot will be required to pay.

(Jury not present)

MR. KENNEDY:

Your Honor, in connection with the statement that you gave to the jury at the commencement of trial when you made reference to the prior or other law suits filed in state court on behalf of the plaintiff, Ms. Billie Jean Flores, reference as to remarks concerning compensation, we respectfully move that those —

THE COURT:

References to what — compensation?

[8] MR. KENNEDY:

Oh, I'm sorry, to settlement. I think that was the term that Your Honor used, was the settlement of those claims. We respectfully move for a mistrial. We do so on the basis of the authority that evidence of any such law suit and particularly any settlement of any other claims has no part in the defense of this action, which the defense of this action has simply been only in answer of general denial, and secondly that evidence of other law suits or settlement of any claims, with either co-defendants or third party defendants, is not admissible. I would like to cite as authority for that proposition — Your Honor, I previously furnished with the Court several days a Fifth Circuit decision which grows out of Judge Putnam's case, B-I-L-L-I-O-T and I forget the name of the citation. Also, I referred to in support of our motion for a mistrial the case of Tipton versus Socony, S-O-C-O-N-Y Mobil Oil Company Inc. which is at 84 Supreme Court, page 1, and further evidence of

law on point as contained in 358 So.2d. 675, which is a First Circuit decision decided May 1, 1978 which I think correctly embodies the present day statement of law concerning introduction of evidence such as has been advised to the jury at this time.

[9] THE COURT:

I'll deny the motion for a mistrial. I don't think there's any serious contest over the fact that state court suits were filed against these two parties is admissible. I think it's pretty clear that the fact that those suits were filed is admissible and the jury would be permitted to know that fact. Now, once the jury knows that the state court suits have been filed claiming fault on the part of Condor and Faherty, then it seems to me that in the interest of justice, the jury ought to know what happened to those suits. If they're kept in the dark, the jury could just as easily as not infer that those two suits are still liable and the plaintiffs may have another bite at the apple down the road. So, if I'm going to err, it's going to be on the side of giving the jury all of the facts surrounding this law suit.

I might say that I chose to handle it in this manner, that is, giving the jury an objective statement as to the status of those two suits, the fact that they were filed, the fact that they were compromised, I chose to give the jury an objective statement myself rather than have counsel for the plaintiff — rather for the defendant spend an inordinate amount of time repeating the allegations of the suit and then [10] have counter witnesses by the plaintiff offering excuses for the suit. It

just seems to me that we get into an area where we obscure the real issues of the law suit and undue emphasis would be placed on the state court suits and compromise. So, I'll deny the motion.

(Reporter's note: The following requested proceedings were had during the Court's charge to the jury on June 30, 1978, as requested on behalf of the plaintiff by Mr. Richard R. Kennedy.)

THE COURT:

Let me tell you again what I told you at the outset. In addition to this suit that was filed here by Ms. Flores, Ms. Flores also filed a suit in state court against Condor Pipe Company, Daniel Faherty and Nick McCullough. Ms. Flores alleged in that suit that her husband's accident was caused through the fault of those three parties, that is, Condor, McCullough and Faherty. Now, that suit has been compromised. You may consider the fact that the petition was filed in state court claiming that Condor, McCullough and Faherty were at fault. However, you should know and should also consider the fact that even though a petition was filed, the fact of the filing of a petition does not constitute a [11] proof of facts alleged in that petition. A petition may be filed by a party or by an attorney on behalf of a party for many reasons. A petition may be filed before all the facts are known. It may be necessary to file a suit before all the facts are known because under our law unless a suit such as this is filed within one year of the date of the accident, that suit is barred. So, the filing of that suit does not constitute proof of the facts alleged in the

suit. The burden of proof will be on Cabot in this case, the defendant, to establish by a preponderance of the evidence that the accident was caused in whole or in part by the negligence of Condor, McCullough or Faherty. That issue, that is, the fault of these three (3) parties has never been decided by a Court or by a jury and this is an issue that is up to you. This will be an issue that will be submitted to you for your decision.

Now, let me tell you the effect of a finding of fault on the part of these three (3) parties. Under Louisiana law if you find that Cabot is responsible to the plaintiff in damages and you find further that fault of Condor or McCullough or Faherty contributed to the accident, the amount Cabot is required to pay to the plaintiff will be reduced. If [12] you find fault on the part of Condor or McCullough of Faherty, then the Court will make an appropriate reduction of the amount that Cabot may be required to pay. You will not — it's not a question submitted to you as how much reduction there will be. That is a matter which the Court will decide. If you reach the damage question, you will decide the total damages the plaintiff is entitled to recover as a result of her husband's death. If by virtue of your answer to interrogatories on the fault of Condor, McCullough or Faherty you find fault on the part of each one or more of these parties, then the Court will make an appropriate deduction for the amount that Cabot will be required to respond.

(Reporter's note: The following proceedings were had during the objections to the Court's charge to the jury on June 30, 1978, as requested on behalf of the Plaintiff by Mr. Richard R. Kennedy.)

MR. KENNEDY:

Finally, Your Honor, merely as a protection of the record because in the charge to the jury you again mentioned the fact that there were other suits that were filed and were compromised. Simply for preservation of the record and without going into it in detail, we would re-urge our motion [13] for a mistrial.

THE COURT:

All right. Thank you, Mr. Kennedy. I will deny your motion for a retrial, I mean, for a mistrial.

(Reporter's note: This concludes the requested portions of the trial transcript on behalf of the plaintiff as requested by Mr. Richard R. Kennedy.)

[14] UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

BILLIE JEAN FLORES

versus C.A. No. 75-0039

CABOT CORPORATION, et al

CERTIFICATE OF REPORTER

I, Vernon L. Miller, Official Court Reporter for the United States District Court, Western District of Louisiana, do hereby certify that the foregoing thirteen (13) pages is a true and accurate transcript of the proceedings had in this matter, as hereinabove set forth, and that I have no interest of any nature whatsoever in the ultimate disposition of this litigation.

/s/ VERNON L. MILLER
VERNON L. MILLER
Official Court Reporter